85-786

No. _____

Supreme Court, U.S.
FILED
NOV 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ELIZABETH L. BELLISSIMO,

Petitioner,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LORAINE SMITH TABAKIN
Tabakin & Carroll
1330 Grant Building
Pittsburgh, PA 15219
(412) 471-3580

Counsel for Petitioner

QUESTIONS PRESENTED

1. Does Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), require a court to accept as conclusive a prior factual finding made by a jury in a consolidated case between the same parties?

2. Did the court of appeals exceed its authority under Rule 52, F.R.C.P., in reversing the trial court's finding of intentional discrimination on the basis of sex, where the undisputed facts included proof that:

(i) petitioner was reprimanded by her supervisor for dancing with a fellow employee, and instructed to feign illness if ever asked to dance again;

(ii) petitioner was referred to by another supervisor as "twinkle toes";

(iii) despite the excellence of her work as an attorney, petitioner's supervisor objected to petitioner's wardrobe, particularly the color of her shoes?

PARTIES

The parties to this proceeding are Elizabeth L. Bellissimo, Westinghouse Electric Corporation and Gerald B. Marcovsky.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Elizabeth L. Bellissimo respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 11, 1985.

OPINIONS BELOW

The decision of the court of appeals is reported at 764 F.2d 175, and is set out at pp. 26a-54a of the Appendix. The order denying rehearing, which is not reported, is set out at pp. 55a-56a. The district court's Findings of Fact and Conclusions of Law, which are reported at 34 F.E.P. Cas. 1498, are set out at pp. 1a - 23a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1985. A timely petition for rehearing was filed, which was denied on July 10, 1985. On September 18, 1985, Associate Justice William J. Brennan, Jr., granted an order extending the date on which the petition for writ of certiorari is due until November 7, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE, RULE AND CONSTITUTIONAL AMENDMENT INVOLVED

Section 703(a) of Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2(a) provides in pertinent part:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Rule 52(a) Federal Rules of Civil Procedure provides in pertinent part:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of

> review. Findings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Amendment 7 of the Constitution of the United States of America provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This is an action alleging that Westinghouse Electric Corporation engaged in unlawful discrimination on the basis of sex against a female attorney. Petitioner, a member of the Pennsylvania bar, was originally hired by Westinghouse in December of 1978. During her first year of employment petitioner worked for two different Westinghouse divisions; in each

case her work was highly praised, and her supervisors found her attitude to be entirely professional. In December, 1979, petitioner was transferred to a unit of the General Counsel's office where she was under the supervision of Gerald Marcovsky. In January, 1980, Marcovsky rebuked petitioner for having danced with a fellow Westinghouse employee, and instructed her never to dance, socialize or drink with clients or fellow employees. Marcovsky also objected to petitioner's clothes, subsequently explaining he was particularly offended by the color of her shoes. In June of 1980, following a complaint by petitioner that she was being paid less than male colleagues, Marcovsky became more antagonistic, and in August of 1980, after a second such complaint, petitioner was fired.

Petitioner commenced this action in the federal district court alleging that Westinghouse had engaged in salary discrimination and had dismissed her because of her sex. The salary discrimination was alleged to violate both Title VII and the Equal Pay Act, while the dismissal claim was based on Title VII alone. In April, 1984, the claims were tried simultaneously before a judge and jury; the jury was to decide the Equal Pay Act claim, while the judge decided the Title VII claim. On April 10, 1984, the jury returned a verdict in favor of petitioner, holding that she was paid less than a male attorney, Frederick Hill, who was doing comparable work. On May 11, 1984, the trial judge entered a decision holding that petitioner had been dismissed because of her sex. The trial judge

refused, however, to find that there had been any salary discrimination.

Respondents appealed from the trial judge's finding of discrimination in dismissal, but did not appeal the jury's verdict with regard to salary discrimination. On June 11, 1985, the Third Circuit reversed the trial court's finding of intentional discrimination. The court of appeals concluded that there was no evidence whatever that petitioner had in any way been treated differently than male attorneys (44a). In reaching this conclusion, the court of appeals, like the district court, gave no weight or consideration to the jury verdict of salary discrimination. The Third Circuit also expressly approved the conduct of petitioner's supervisor in objecting to petitioner's clothes and in forbidding her to dance and socialize with colleagues and

clients, the appellate court sanctioning those objections as reasonably calculated to avoid "a negative impression with the clients." (47a).

REASON FOR GRANTING THE WRIT

I. The events leading to this litigation are a case study in the variety of forms of discrimination that are faced by women graduates of the nation's law schools as well as by women holding other professional or managerial positions. The petitioner, after a year of highly praised legal work for Westinghouse,[1/] had the ill fortune to be assigned to a supervisor whose attitudes towards female attorneys were a throwback to the era of Bradwell v. Illinois, 83 U.S. 130 (1873). When, at a gathering of Westinghouse officials, petitioner danced with one of her male colleagues she was rebuked by that supervisor and instructed to feign illness and retire to her hotel room if ever again asked to dance under such

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1/ See p. 13, infra.

circumstances.[2] Another supervisor referred to petitioner as "twinkle toes", a remark to which petitioner took understandable offense.[3] Although most witnesses agreed that petitioner dressed in a manner entirely appropriate for an attorney[4], petitioner's supervisor was

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2/ See n. 15, infra.

3/ Tr. 234a-35a, 429a-430a. Transcript citations ("Tr.") are to the Court of Appeals Appendix.

4/ Tr. 530a - 531a. (Quoting petitioner's prior supervisor, Attorney Blair Crawford)

"Q: How did Ms. Bellissimo dress?

A: You know, nicely I guess.

Q: Did she stand out in any way?

A: No. Not really. I mean, I must admit that's not an area that I spent a whole lot of time worrying about, unless it was bizarre one way or the other, which it certainly wasn't.

highly critical of the color of her shoes.[5/] Throughout her period of employment petitioner was the lowest paid attorney in the Westinghouse law

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4/ continued.

> Q: Was her dress and appearance, then, within the realm that you would consider appropriate and normal?
>
> A: Sure. It just didn't seem to me to be very remarkable one way or the other."

Tr., 603a. (Quoting Marcovsky's secretary, Mrs. Provolt.)

> "Q: Could you give us your impressions of her appearance.
>
> A: Elizabeth is a very lovely young lady, she always looked nice and dressed well.
>
> Q: Was she appropriately dressed for the office?
>
> A: I thought she was."

5/ Tr. 920a, 932a - 934a.

department.[6] Petitioner, like forty (40%) percent of all female lawyers at Westinghouse, was paid less than the salary normally paid for her position.[7] Against this background petitioner learned that one of her male law school classmates had been hired by Westinghouse at a salary $6,000 a year higher than her own.[8] Following a meeting at which petitioner complained about this apparaent discrimination, she was summarily dismissed.[9]

The circumstances of this case make painfully clear that neither a law degree nor legal work of the highest quality can confer on a woman any immunity from the types of sexist attitudes and practices

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6/ Plaintiff's Exhibit 39, Tr. 1185a - 1189.

7/ Plaintiff's Exhibit 39, Tr. 1191a - 94a.

8/ Tr. 220a - 21a.

9/ Tr. 219a - 20a.

that confront women in pink and blue collar jobs. Petitioner is a summa cum laude graduate of the University of Pittsburgh. She graduated in 1978 from the University of Pittsburgh Law School, where she earned honors in appellate advocacy and served as an intern to now Chief Judge Aldisert of the United States Court of Appeals for the Third Circuit. Her initial supervisors at Westinghouse characterized her work as "good",[10/] "fine"[11/] and "extremely thorough.[12/] A corporate vice-president described petitioner as "an excellent employee who is punctual, thorough, and capable of handling any challenging task.[13/] Even the supervisor who actually demanded that petitioner be

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10/ Tr. 692a.

11/ Tr. 1157a, 528a, 231a.

12/ Tr. 1370a.

13/ Tr. Id.

dismissed never questioned her skill as an attorney.[14/]

On this record the district court understandably concluded that petitioner had been the victim of unlawful discrimination on the basis of sex. The trial judge found that the "discriminatory treatment of plaintiff was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." (19a). The judge noted that, although petitioner's prior supervisors had been pleased with her work, the supervisor who demanded her dismissal had demonstrated "extreme animosity". (5a, 21a). Westinghouse explained, somewhat lamely, that it had dismissed petitioner because she did not get along with the supervisor who objected to her clothes and dancing. The district court concluded that this explanation was a mere pretext, since "the reason [petitioner] could not

14/ Tr. 219a, 1007a.

get along with [her supervisor] was that he bore a discriminatory animus against her on the basis of her sex and that 'but for' this discrimination she would not have been discharged." (18a). The trial judge did not credit the supervisor's testimony that he had sought to dismiss petitioner because of alleged deficiencies in her punctuality.

The court of appeals reversed this factual finding of discrimination, and held instead that petitioner had been dismissed merely because she had a personality conflict with her immediate supervisor. (54a). The district judge, who had questioned that supervisor directly, and carefully observed his demeanor on the stand, concluded that the supervisor's actions and testimony were tainted by discrimination. The court of appeals, ignoring this Court's admonition in Anderson v. City of Bessemer City, North Carolina _____ U.S. _____, 105 S.Ct.

1504 (1985) regarding the importance of demeanor evidence, entered its own finding that the supervisor's motives were beyond reproach. (54a). On a number of factual issues which the Third Circuit thought important, the district court opinion was silent, and the evidence often conflicting. Although Pullman Standard v. Swint, 456 U.S. 273 (1982), requires a remand to the trial court for any needed additional findings, the Third Circuit undertook to make such findings on its own. Had the Third Circuit merely usurped the role of the trial judge and violated the commands of Anderson and Swint, the ramifications of its opinion would be fairly limited. But the court of appeals went further and expressly endorsed the very discriminatory behavior of which petitioner complained.

Following the dancing incident, petitioner's supervisor issued to

petitioner three distinct instructions: first, she was never to dance with a colleague or client, but should evade any invitation to do so by feigning a headache and returning to her room; second, she was never to dance with anyone at all while she was on a business trip; third, she was never to socialize or have a drink with a client.[15] The third instruction was issued in the face of Westinghouse's policy which generally authorized attorneys to socialize with clients, and provided

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15/ Tr. 230-32a.

"A: Well [my supervisor] was very upset with me. And he told me that he had heard that I had danced with one of the management employees. And he went on to say that I was not allowed to do that. I was not allowed to dance with management employees or anyone else, as a matter fact, when I was on a business trip.

A: He said to me that I was not allowed to do that. And he

reimbursement for the cost of the drinks which petitioner alone was forbidden to

15/ continued

> forbade me from doing that ever again, and I asked him what I was to do if someone, when I was on a business trip, would ask me to dance, and what he told me was to say I had a headache. I was not to dance. I was to say I had a headache.
>
> A: And he went on to say that I was -- he forbade me from dancing. I was to say I had a headache and I was to just go to my room and stay there ... while I was on a business trip. When I was done with my business, I was just to go to my room."

Tr. 411a:

"A: He told me that he had heard that I had danced with one of the Westinghouse people when I was on this trip, and he told me that he didn't like that, and that I was never to do that again. And if someone asked me to dance, I was to say that I had a headache."

Tr. 412a:

"A: After he told me that I wasn't to dance I asked him questions.

share with a client.[16] The Third Circuit saw nothing wrong with these

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15/ continued

Q: What questions?

A: Was I permitted to go to have drinks with my clients? And he said no, I wasn't to do that either. That he would prefer it if I just went to my room and stayed there after I had conducted my business matters."

Tr. 413a:

"A: All I recall him telling me is that I wasn't to dance, and if I was asked to dance I was to say I had a headache. And that I wasn't to socialize, I was to just go to my room and stay there after I had conducted my business matters."

Tr. 414a-15a:

"A: ... He went on to state that he forbade me to dance with any man, including a Westinghouse employee, even after business hours while I'm away on business trips ... I asked him if I was allowed to socialize with my clients, e.g., go out for drinks. He said that he wanted me to just go to my hotel room and stay there after I had concluded my business matters."

16/ Tr. 1176a.

rules,[17] concluding that they were "within the realm of Mr. Marcovsky's concerns as a supervisor" and were justified to avoid creating a "negative impression with the clients." (47a). The Third Circuit insisted that petitioner was treated the same way as male attorneys, but not because male attorneys were ever forbidden to drink, socialize or dance with colleagues or clients. No such prohibitions existed, and nothing in the record indicates that Westinghouse had rebuked the male Westinghouse employee with whom petitioner had danced. The Third Circuit's finding that men and women were treated alike was based solely on testimony that two male employees had been admonished

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17/ A higher official at Westinghouse ultimately told petitioner that she was not obligated to obey the instruction about dancing, but shortly thereafter fired her because she was not getting along with the supervisor who had issued that order.

after the publication of a newspaper picture depicting them playing the kazoo in a public plaza.[18/]

The decision of the Third Circuit, in approving the supervisor's instructions, has sanctioned precisely the types of discrimination and sexual stereotypes which Title VII condemns. Implicit in the action of petitioner's supervisor, and in the decision of the court of appeals is an assumption that female attorneys are simply incapable of socializing in an appropriate manner with clients and colleagues, or that any such socialization is so fraught with implications of sexual indiscretion that it must be prevented to preserve appearances. For decades this attitude contributed to the refusal of employers to hire women, or to place them in positions of responsibility. Since the enactment, however, of Title VII, that attitude has no place in the offices

18/ Tr. 1176a.

and plants of the United States. If a supervisor forbade a black employee from socializing, drinking or dancing with white clients or colleagues, every federal judge in the land would recognize the racist attitude at work; the decision of the Third Circuit, sanctioning as legitimate precisely such treatment of women, cannot be permitted to stand.

The Third Circuit's opinion reflects a similar approval of the supervisor's preoccupation with the clothes of female employees. Most of petitioner's colleagues saw nothing unusual or noteworthy about petitioner's wardrobe[19/] and neither the district court nor the court of appeals found that petitioner's clothes had in fact deviated in any way from ordinary business attire. Nonetheless, petitioner's immediate

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19/ See n. 4, infra.

supervisor expressed a particular fascination with the color of petitioner's shoes and with the style of her skirts. Another male supervisory employee expressed objection to petitioner's "evening clothes," especially a particular pair of pants.[20/] The Third Circuit thought it entirely appropriate that these male supervisors were so interested in petitioner's pants, shoes and skirts, reasoning that those concerns were similar to the firm's requirement that male attorneys wear suits and ties. (49a).

But Westinghouse management did not establish for female attorneys any simple rule, such as a requirement that they wear suits; rather, these supervisors scrutinized petitioner's wardrobe as if they were fashion editors for a turn of the century issue of Harper's Bazaar. In the Third

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20/ Tr. 1034a.

Circuit's view a law firm which announced a policy of requiring conservative dress style could regulate the clothing of female attorneys from head to toe, or dismiss or deny partnership to a woman attorney because her attire did not conform to some supervisor's taste regarding, for example, shoe color. The decision below sanctions employer regulation of the clothes of a female with a degree of detail and intrusiveness far greater than that to which male attorneys are ever subject. Although this Court requires counsel at oral argument to wear "conservative business dress", the Clerk, in implementing that rule, does not evaluate the hue of women's shoes, or assess the stylishness of their skirts. The preoccupation with such matters by petitioner's supervisor cannot be sanctioned or understood, as the court of appeals believed, as a routine matter of corporate imagery.

The discriminatory practices that drove petitioner from the Westinghouse law department are familiar to far too many working women, and understood by too few judges. These practices are too diverse and subtle to be eradicated by the pronouncement of any simple legal rule; what is necessary is a decision by this Court that will mandate greater sensitivity to such problems on the part of the lower courts. The decision of the Third Circuit licenses any employer which professes a preference for conservative employee conduct to regulate in the most intrusive way the clothes and social lives of its female workers, and virtually precludes the lower courts in that circuit from inquiring into the bona fides of such intrusions. Certiorari should be granted to make clear that Title VII does not permit any employer to require its female workers, on pain of dismissal, to act

like Meg in Louisa May Alcott's Little Women.

II. Six years ago in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), this Court held that a jury must accept as conclusive a prior factual finding by a judge in an equitable proceeding. The question presented by this case is the obverse of that in Parklane, whether a Court in an equitable proceeding must accept as conclusive the prior factual finding of a jury. The decision below is in conflict with the decisions of the Second, Eighth, and Eleventh Circuit Courts of Appeal. The Eighth Circuit has twice held that a jury verdict on any issue of fact "is normally conclusive of the same issue in the Title VII context as well." King v. Alco Controls, 746 F.2d 1331, 1332 n. 2 (8th Cir. 1984).21/

21/ See also Goodwin v. Circuit Court of St. Louis County, 729 F.2d 541, 549 n.

In an action tried to a jury and a judge respectively, the Eleventh Circuit ruled "[w]hen a party has the right to a jury trial on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim." Lincoln v. Board of Regents of Univ. System, 697 F.2d 928, 934 (11th Cir.), cert. den., 104 S.Ct. 97 (1983).

Parklane was a stockholder action for damages based on allegedly false and misleading assertions in a proxy statement. After Parklane was filed, but before it came to trial, the Securities and Exchange Commission brought and won an action for injunctive relief; in granting that

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21/ continued.

11 (8th Cir.), cert den., 105 S.Ct. 1194 (1985). ("a jury verdict on the issue of discrimination would collaterally estop the parties with respect to that issue on the Title VII claim.")

injunction a federal judge concluded that the disputed proxy statements were indeed false and misleading. The plaintiff in Parklane argued that the judge's finding was binding on Parklane as a matter of collateral estoppel, and this Court held that such a use of collateral estoppel to preclude jury consideration of the disputed facts did not violate the Seventh Amendment. 439 U.S. at 333-337. Justice Rehnquist dissented, insisting that the prior judicial factual determination could not annul the defendant's Seventh Amendment right to a jury trial concerning those issues. 439 U.S. at 337-406.

The procedural posture of this litigation is the obverse of that in Parklane. Here a jury first decided petitioner's Equal Pay Act claim finding that Westinghouse had discriminated against petitioner by paying her less than a

similarly situated male attorney. One month later, in his decision on petitioner's Title VII claim, the trial judge found precisely the opposite, holding that no salary discrimination had in fact occurred. (20a). The jury verdict was necessarily based on a factual finding that petitioner did the same work as a better paid male attorney; the district court, however, in its own opinion, reconsidered those same issues, and held that petitioner did not perform similar work. A comparison of the language of the jury instructions and the trial court's opinion make clear that they were deciding the same issues. The judge instructed the jury that in order to return a verdict for petitioner it must find that, with respect to the jobs of the petitioner and her recently hired colleague, Frederick Hill, "That the work in question required equal skill, equal effort, and equal

responsibility, and ... that the work was performed under similar working conditions." (Tr. 1319a). One month after the jury returned that verdict, the trial judge issued its own opinion on the Title VII claims, holding that "[p]laintiff did not perform work that required equal effort, skill, and responsibility as that performed by Hill under similar working conditions ..." (20a).

The district court nonetheless found that petitioner had been dismissed because of her sex, and on appeal petitioner relied on the jury finding of salary discrimination in attempting to support the trial court's finding with regard to the termination.[22/] The Third Circuit recognized that petitioner's discharge claim turned largely on whether she had been treated differently than men prior to her dismissal. The court

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22/ Brief for Appellee, pp. 3, 9, n. 9.

of appeals refused, however, to consider the jury's finding that petitioner's salary -- the single most important aspect of her employment -- was lower because of her sex. The Third Circuit deliberately restricted the scope of its opinion to exclude any consideration of the wage discrimination found by the jury:

> In all of the aspects of employment the district court examined -- dress, working hours, behavior with clients, evaluations, and luggage handling -- there was no evidence to support her contention that she was treated differently from male employees. (53a-54a) (Emphasis added.)

The discriminatory treatment found by the jury -- salary discrimination -- was thus systematically and purposely ignored by the court of appeals.

The refusal of the Third Circuit to consider the proof and finding of salary

discrimination was central to its holding that the record contained no evidence of any form of disparate treatment. The jury verdict in this case, had the court of appeals not chosen to ignore it, would have provided decisive support for the trial court's finding of wrongful discharge. Once an employer has demonstrated an inclination to pay an employee less because of her sex, any other adverse personnel action is extremely suspect. Here that demonstration should have been conclusive. The level of petitioner's salary was a subject of contention at the critical meetings in the spring and summer of 1980 that immediately preceded petitioner's dismissal, and that salary dispute was a key element in the recommendation of petitioner's supervisor that petitioner be discharged.

The decision of the Third Circuit is in conflict with the decisions of this Court and of other courts of appeals. From Beacon Theatres v. Westover, 359 U.S. 500 (1959) to Parklane, this Court has insisted that where the same issue is presented to both a judge and a jury, the first decision on that issue is controlling. The courts of appeals have understood such a situation to present a clear application of collateral estoppel, despite the inherent differences between judges and juries.[23/] In a case in which a trial judge had resolved a claim in a manner contrary to a jury's earlier resolution of a related factual issue, the Second Circuit emphasized, "Inconsistent determinations based upon the same evidence at the same

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23/ In addition to the Eighth and Eleventh Circuit decisions cited above, see, e.g. Johnson v. Univ. of Bridgeport, 20 F.E.P. Cas. 1776, 1768-9 (D. Conn. 1979) (Title VII and Equal Pay Act

trial are logically impossible. The court must follow the verdict of the jury." Caputo v. United States Lines Co, 311 F.2d 413, 416 (2d. Cir. 1963).

In the instant case the Third Circuit not only permitted but required inconsistent verdicts. Here Westinghouse dismissed petitioner for the professed reason that her complaints about her salary and other matters demonstrated her inability to work with her supervisor. The jury held that those salary complaints were absolutely justified, and that Westinghouse had violated Federal Law in setting her salary lower than the salary of a comparable male attorney. The Third

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23/ continued

claim); Brooks v. Carnation Pet Food Co., 38 F.E.P. Cas. 1663, 1664 (W.D. Mo. 1985) (Title VII and §1981 claims); Barding v. Board of Curators of Lincoln Univ., 497 F. Supp. 1013 (W.D. Mo. 1980) (Title VII and §1981 claims).

Circuit holds that those very complaints, far from being legitimate, demonstrate that petitioner was a "strident, touchy, and difficult employee." (54a). The jury held that the salary dispute underlying petitioner's disagreement with Westinghouse was a result of illegal action by the employer; the court of appeals dismisses those differences as merely an "unfortunate ... conflict of personalities." (54a).

The specific problem posed by the procedural history of this case is of substantial and growing importance. This Court has repeatedly held that actions for back pay are equitable proceedings. Consolidated Rail Corp. v. Darrone, ____ U.S. _____, 104 S.Ct. 1248 (1984). But Title VII actions are often joined with employment discrimination claims for actual or punitive damages under 42 U.S.C. §1981, 42 U.S.C, §1983, or

the Equal Pay Act.[24/] The lower courts are increasingly confused as to how to handle these interrelated legal and equitable claims, and as to the degree of deference, a court must pay to the jury verdict. Certiorari should be granted to end that confusion, to resolve the conflict among the Second, Third, Eighth and Eleventh Circuits, and to make clear that the principles of Parklane are fully applicable where, as here, those principles would expand rather than contract the authority of a Seventh Amendment jury.

24/ See p. 27 and n. 23 infra.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

LORAINE SMITH TABAKIN
Tabakin & Carroll
1330 Grant Building
Pittsburgh, PA 15219
(412) 471-3580

Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELIZABETH L. BELLISSIMO, Plaintiff, vs. WESTINGHOUSE ELECTRIC CORPORATION, a corporation; and ROBERT J. McGRATH and GERALD B. MARCOVSKY, individuals, Defendants.	)	Civil Action No. 81-1650

FINDINGS OF FACT

1. Plaintiff Elizabeth Bellissimo is an individual who resides in Pittsburgh, Pennsylvania.

2. Defendant Westinghouse Electric Corporation (hereinafter referred to as "Westinghouse") is a corporation with its principal place of business located in Pittsburgh, Pennsylvania.

3. Defendant Robert McGrath (hereinafter referred to as "McGrath") is an

individual who resides in Allegheny County, Pennsylvania.

4. Defendant Gerald B. Marcovsky (hereinafter referred to as "Marcovsky") is an individual who resides in Allegheny County, Pennsylvania.

5. Defendant Westinghouse is an employer engaged in interstate commerce, in the production of goods for commerce, and in an industry affecting commerce.

6. At all pertinent times, defendants McGrath and Marcovsky were agents of defendant Westinghouse.

7. At all pertinent times, defendant Westinghouse was acting through its agents, servants, and employees, including but not limited to defendants McGrath and Marcovsky, who were acting within the scope of their authority and employment.

8. Plaintiff attended the University of Pittsburgh School of Law from September of 1975 until her graduation in May of 1978.

9. During the summers of 1976 and 1977, plaintiff worked as an intern for defendant Westinghouse's Nuclear Power Public Acceptance Program. Her supervisor while so employed was Romano Salvatora (hereinafter referred to as "Salvatora").

10. Plaintiff had no problems in her working relationship with Salvatora.

11. After her graduation from the University of Pittsburgh School of Law, plaintiff took, and received a passing score on, the Pennsylvania Bar Examination, thereby enabling her to engage in the practice of law in Pennsylvania as of November of 1978.

12. In December of 1978, plaintiff was offered a job by defendant Westinghouse as a "contract specialist" with the Industry

Construction Products Division at the Ardmore Site (hereinafter referred to as "Ardmore Site").

13. The position of contract specialist was not contained in the legal department of defendant Westinghouse and did not require a lawyer to perform the work.

14. Plaintiff accepted the job with defendant Westinghouse.

15. The Ardmore Site was a new division of defendant Westinghouse in December of 1978 and was not ready for plaintiff's services at that time, and, therefore, plaintiff was assigned to the International Law Section of defendant Westinghouse's legal department for a six-month training period.

16. Plaintiff's work assignments in the International Law Section included training for the position of contract specialist and legal work in the area of international law.

17. Plaintiff's supervisor during her assignment to the International Law Section was Blair Crawford (hereinafter referred to as "Crawford").

18. Crawford found plaintiff's work to be adequate and had no problems in his working relationship with her or with the manner in which she dressed for work.

19. On June 1, 1979, plaintiff commenced work at the Ardmore Site as a contract specialist.

20. Plaintiff's supervisor at the Ardmore Site was Richard Kimball (hereinafter referred to as "Kimball").

21. Kimball rated plaintiff's work as good during the period that she worked under his supervision and had no serious problems in his working relationship with her or with the manner in which she dressed for work.

22. In a letter dated October 9, 1979, plaintiff advised Robert F. Pugliese

hereinafter referred to as "Pugliese"), General Counsel of defendant Westinghouse, that she was not satisfied with her position at the Ardmore Site, that she had decided to terminate her employment at the Ardmore Site as of October 31, 1979, that she was interested in working in the legal department of defendant Westinghouse, and that she would like to discuss the possibility of a job in the legal department with him at his earliest convenience.

23. Pugliese forwarded plaintiff's letter to defendant McGrath, head of the Public Systems Division of the legal department, and asked him to consider her for employment.

24. Defendant McGrath, along with defendant Marcovsky and Jean Provost--head of the construction group of the legal department--interviewed plaintiff, and plaintiff was offered a job in the legal

department shortly after the interview.

25. Plaintiff accepted the offer of employment and commenced work in the legal department in November of 1979.

26. Plaintiff worked for the learning and leisure group of the legal department, and her supervisor was defendant Marcovsky.

27. The learning and leisure group performed legal work for some of the businesses (subsidiary corporations) owned by defendant Westinghouse, such as the 7-Up Bottling Companies of California and Indiana and Longines-Wittnauer.

28. In January of 1980, plaintiff accompanied defendant Marcovsky on a business trip to Vernon, California, for the purpose of attending a business meeting concerning the bottling subsidiaries.

29. While in California and after business hours, plaintiff danced with a management employee of defendant Westinghouse.

30. After returning from California, defendant Marcovsky met with plaintiff and advised her not to dance or to socialize with Westinghouse employees while away on business trips and, in order to avoid such contacts, to go to her hotel room when confronted with such contacts.

31. Also at this meeting, defendant Marcovsky expressed dissatisfaction with the manner in which plaintiff dressed for work. Defendant Marcovsky's dissatisfaction with plaintiff's dress was based on his belief that some of her clothing fit too tightly and that some of her clothing was too bright in color.

32. In February of 1980, plaintiff and defendant Marcovsky had a business meeting, and at that meeting, defendant Marcovsky advised plaintiff that others should relate to her as a lawyer and not as a woman and that she should discourage others from

relating to her in any fashion other than as a lawyer.

33. In March of 1980, defendant Marcovsky questioned plaintiff's secretary on whether plaintiff and the secretary were "getting along." The secretary responded that they were getting along very well.

34. On May 1, 1980, plaintiff asked defendant Marcovsky to formally evaluate her. Defendant Marcovsky gave no definite response to plaintiff's request at that time.

35. At a meeting between plaintiff and defendant Marcovsky on June 4, 1980, defendant Marcovsky did respond to plaintiff's evaluation request by refusing to evaluate her until October of 1980. Also at this meeting, defendant Marcovsky questioned plaintiff's working hours.

36. On June 5, 1980, plaintiff again met with defendant Marcovsky, and, at that

meeting, defendant Marcovsky advised plaintiff that he would not recommend a salary increase after the October, 1980 evaluation unless she changed her attitude on working hours.

37. On July 1, 1980, Frederick Hill (hereinafter referred to as "Hill") began work in the Westinghouse legal department.

38. Hill was paid a higher salary than plaintiff.

39. Hill was paid a higher salary because he had more prior legal work experience that the plaintiff, because he was given greater responsibility than plaintiff by defendant Westinghouse, and because he was capable of performing a greater variety of work than plaintiff.

40. On August 8, 1980, plaintiff met with defendant Marcovsky to discuss a business acquisition meeting that she had attended the previous day. At this meeting,

defendant Marcovsky again raised the subject of plaintiff's working hours, stating that she had been arriving late and leaving early.

41. Plaintiff took issue with defendant Marcovsky's comments on her working hours.

42. Defendant Marcovsky maintained an antagonistic attitude toward plaintiff throughout the period in which he was her supervisor.

43. After the meeting, defendant Marcovsky informed his immediate supervisor, defendant McGrath, that he could no longer work with plaintiff.

44. Defendant McGrath decided to recommend plaintiff's termination because she could not get along with defendant Marcovsky and because defendant Marcovsky was an experienced employee and plaintiff was not.

45. On August 18, 1980, defendant McGrath met with his immediate supervisor, Samuel Pitts, and with Pugliese and recommended that plaintiff be terminated. These two individuals accepted defendant McGrath's recommendation.

46. Pugliese instructed defendant McGrath to offer plaintiff the option of resigning with full salary through the end of September, 1980.

47. On August 18, 1980, defendant McGrath met with plaintiff and informed her that she could resign by August 22, 1980, with full salary through the end of September, 1980, or be terminated effective August 31, 1980.

48. Plaintiff did not exercise the option to resign by August 22, 1980, and she was terminated by defendant Westinghouse effective August 31, 1980.

49. Plaintiff timely filed a comprehensive written charge of sex discrimination with the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC") at No. 034-810142.

50. The EEOC thereafter deferred the charge to the Pennsylvania Human Relations Commission, which, without conducting an investigation and without dismissing the charge or making a determination, returned the case to the EEOC.

51. The EEOC subsequently undertook an investigation of plaintiff's charge, but did not conclude its investigation or make a determination after the passage of one year.

52. On September 24, 1981, at the request of plaintiff, the EEOC issued, to plaintiff, a right to sue letter.

53. On September 28, 1981, plaintiff instituted this action, which contains claims under Title VII of the Civil Rights

Act, the Pennsylvania Human Relations Act, and the Equal Pay Act.

54. The Court commenced the trial of the case on March 28, 1984, with the Title VII and Pennsylvania Human Relations Act claims tried by the Court and the Equal Pay Act claim tried by the jury.

55. The Equal Pay Act claim was submitted to the jury on the basis of the salary differential paid to Hill as opposed to plaintiff, and the jury returned a verdict in favor of plaintiff and against defendant Westinghouse.

56. While employed in defendant Westinghouse's legal department, plaintiff was paid $21,408 per year, and if paid at that rate from September 1, 1980 through April 30, 1984, plaintiff would have earned $78,496.

57. Plaintiff would have received benefits valued at $6,550 per year, for a

total of $24,016.67, if employed by defendant Westinghouse from September 1, 1980, through April 30, 1984.

58. From September 1, 1980 through April 30, 1984, plaintiff earned a total of $8,800 from her employment in the practice of law as a sole practitioner.

CONCLUSIONS OF LAW

1. Defendant Westinghouse is an employer within the meaning of the following statutes: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e(b); the Equal Pay Act of 1963, as amended, 29 U.S.C. §203(d); and the Pennsylvania Human Relations Act, 43 P.S. §954(b).

2. Defendants McGrath and Marcovsky are employers within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e(b).

3. Plaintiff is an employee within the meaning of the following statutes: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e(f); the Equal Pay Act of 1963, as amended, 29 U.S.C. §203(e)(1); and the Pennsylvania Human Relations Act, 43 P.S. §954(c).

4. This Court has jurisdiction over the parties to, and the subject matter of, this lawsuit pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(f)(3); the Equal Pay Act of 1963, as amended, 29 U.S.C. §216(b); 28 U.S.C. §1331; and pendent jurisdiction.

5. Plaintiff has fulfilled all administrative requirements necessary to the commencement of this suit.

6. Plaintiff is a member of a protected class (females) within the meaning of Title

VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act.

7. The elements of a Pennsylvania Human Relations Act claim are the same as those of a Title VII claim. General Electric Corp. v. Commonwealth Human Relations Commission, 469 Pa. 292, ---, 365 A.2d 649, 655-56 (1976).

8. Plaintiff's claim of sex discrimination is based on the disparate treatment theory. Massarsky v. General Motors Corp., 706 F.2d 111, 117 (3d Cir.), cert. denied, 104 S.Ct. 348 (1983).

9. Plaintiff established a prima facie case of sex discrimination by establishing that she was, and is, a member of the protected class and that she was terminated from a job for which she was qualified while others not in the protected class were treated more favorably. Massarsky, 706 F.2d at 118.

10. Defendants established a legitimate, nondiscriminatory reason for plaintiff's discharge, thereby rebutting the inference of discrimination created by the prima facie case (McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)), in that the testimony and evidence showed that plaintiff was terminated due to her inability to get along with her supervisor, defendant Marcovsky.

11. Plaintiff established that the legitimate, nondiscriminatory reason asserted by defendants is mere pretext (McDonnell Douglas, 411 U.S. at 804) in that she establsihed that the reason she could not get along with defendant Marcovsky was because he bore a discriminatory animus against her on the basis of her sex and that "but for" this discrimination she would not have been discharged. Lewis v. University

of Pittsburgh, 725 F.2d 910, 914 (3d Cir. 1983).

12. Defendant Marcovsky's discriminatory conduct constituted more than a mere isolated incident (Gilbert v. City of Little Rock Arkansas, 722 F.2d 1390, 1394 (8th Cir. 1983)); his discriminatory treatment of plaintiff was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment that affected the psychological well-being of plaintiff. Walker v. Ford Motor Co., 684 F.2d 1355, 1358 (11th Cir. 1982); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

13. Defendant Westinghouse is responsible for the conduct of defendant Marcovsky on the basis of vicarious liability.

14. Plaintiff did not establish any discriminatory treatment by defendant McGrath.

15. Plaintiff is entitled to backpay as a result of the discriminatory discharge. 42 U.S.C. §2000e-5(g); 43 P.S. §962(c).

16. Plaintiff did not perform work that required equal effort, skill, and responsibility as that performed by Hill under similar working conditions and, therefore, the Court does not award plaintiff's backpay at the rates received by Hill after plaintiff's discharge; instead, the Court awards backpay at the rate plaintiff was paid at the time of her discharge--$21,408 per year or $1,784 per month.

17. Plaintiff is awarded backpay of $93,712.67, which figure represents the amount that plaintiff would have been paid,

including fringe benefits, if employed by defendant Westinghouse from September 1, 1980 through April 30, 1984, less the amount that she earned as a sole practitioner.

18. Reinstatement is an inappropriate remedy in this case for the following reasons: (a) plaintiff's former position involved client contact and the potential for lack of trust and confidence between plaintiff and defendant Westinghouse could seriously damage defendant Westinghouse's relationship with its clients (EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), aff'd. mem., 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977); and (b) the extreme animosity between plaintiff and defendants Marcovsky and Westinghouse would render an effective working relationship impossible. Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 281 (8th Cir. 1983);

Cancellier v. Federated Department Stores, 672 F.2d 1312, 1319-20 (9th Cir.), cert. denied, 103 S.Ct. 131 (1982); Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980).

19. In lieu of reinstatement, the Court awards plaintiff one year's salary (including fringe benefits), $27,958, as "front pay" because the Court finds that, under the current market and economic climate in the legal field, plaintiff, by the exercise of reasonable diligence, should be able to secure employment at a salary commensurate with her skills within one year. EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. at 927. See Fitzgerald, 624 F.2d at 956-57; Mosley v. Clarksville Memorial Hospital, 574 F. Supp. 224, 237 (M.D. Tenn. 1983); Francoeur v. Corroon & Black Co., 552 F. Supp. 403, 413

(S.D.N.Y. 1982). This brings plaintiff's total monetary award to $121,670.67.

20. An award of front pay is appropriate though such relief is not specifically requested by the pleadings. Fitzgerald, 624 F.2d at 957.

21. Plaintiff is entitled to injunctive relief in the form of an order expunging all negative comments concerning her discharge from her employment records at defendant Westinghouse.

22. Defendant Westinghouse acted in good faith and established that there were reasonable grounds for believing that it was in compliance with the Equal Pay Act (see Marshall v. Brunner, 668 F.2d 748, 753 (3d Cir. 1982)), and, therefore, the Court does not award liquidated damages under said Act, 29 U.S.C. §260.

Date: May 11, 1984

/s/ Alan N. Bloch
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELIZABETH L. BELLISSIMO, Plaintiff, vs. WESTINGHOUSE ELECTRIC CORPORATION, a corporation; and ROBERT J. McGRATH and GERALD B. MARCOVSKY, individuals, Defendants.	)	Civil Action No. 81-1650

JUDGMENT

Pursuant to Judgment Order entered, judgment is hereby entered in favor of plaintiff and against defendants Westinghouse Electric Corporation and Gerald B. Marcovsky, jointly and severally in the amount of $121,670.67; judgment is hereby entered in favor of defendant Robert J. McGrath and against plaintiff Elizabeth L. Bellissimo.

/s/ Gilbert W. Conley
Clerk

Date: May 14, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELIZABETH L. BELLISSIMO,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action
	)	No. 81-1650
WESTINGHOUSE ELECTRIC CORPORATION, a corporation; and ROBERT J. McGRATH and GERALD B. MARCOVSKY, individuals,	)	
	)	
Defendants.	)	

JURY VERDICT AND JUDGMENT

Pursuant to JURY VERDICT AND JUDGMENT ON JURY VERDICT filed by the Clerk, judgment is entered in favor of plaintiff Elizabeth L. Bellissimo and against defendant Westinghouse Electric corp., a corporation in the amount of $1,016.00 together with costs.

/s/ Gilbert W. Conley
Clerk

Date: April 11, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3375

ELIZABETH L. BELLISSIMO,

v.

WESTINGHOUSE ELECTRIC CORP., a corporation, ROBERT J. McGRATH; and GERALD B. MARCOVSKY, individuals

Westinghouse Electric Corporation and Gerald B. Marcovsky,

Appellants

On Appeal from the United States District Court for the Western District of Pennsylvania (C.A. No. 81-1650)

Argued February 26, 1985

Before: ADAMS, WEIS AND WISDOM*, Circuit Judges

(Filed June 11, 1985)

CHARLES R. VOLK
JANE A. LEWIS (Argued)
Thorp, Reed & Armstrong
Pittsburgh, PA 15222

Counsel for Apellants

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*The Hon. John Minor Wisdom, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

LORAINE SMITH TABAKIN (Argued)
Tabakin & Carroll
Pittsburgh, PA 15219

HOWARD F. MESSER
E. J. Strassburger
Strassburger McKenna
Messer Shilobod
& Gutnick
Pittsburgh, PA 15222

Counsel for Appellee

OPINION OF THE COURT

WISDOM, Senior Circuit Judge

In this case, we must determine whether a plaintiff in a sexual discrimination case has met her burden of proof under Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The plaintiff, a discharged attorney, won judgment on her allegations of sexual discrimination. The defendants appealed, arguing that the district court erred in finding sexual discrimination on the evidence adduced at trial and in

failing to assign to the plaintiff the burden of proving by a preponderance of the evidence that the defendant's legitimate, nondiscriminatory reason for her discharge was pretextual. We hold that the district court's finding that the reasons alleged for the plaintiff's discharge were pretextual is clearly erroneous, and accordingly reverse.

I. FACTS AND PROCEEDINGS BELOW

Elizabeth Bellissimo, an attorney, challenges her discharge from the legal department of Westinghouse Electric Corporation. Ms. Bellissimo's complaint alleged violations of Title VII, the Pennsylvania Human Relations Act, and the Equal Pay Act of 1963. It also alleged pendent state claims for wrongful discharge, defamation, and intentional infliction of emotional distress. The

court dismissed the wrongful discharge claim upon the defendants' motion. Ms. Bellissimo withdrew her defamation claims.

At the end of a consolidated trial, the district judge dismissed the claim of intentional infliction of emotional distress, and submitted only the equal pay count to the jury. The jury returned a verdict of $1016. The district court denied liquidated damages, holding that Westinghouse acted in good faith and had established that it had reasonable grounds for believing it was in compliance with the Equal Pay Act. The Court made Findings of Fact and Conclusions of Law on the Title VII claim, and entered judgment for Ms. Bellissimo in the sum of $121,670.67, the value of her projected wages at Westinghouse through one year beyond the date of judgment, minus about $8,800 she earned as a sole practitioner from 1980 through 1983.

Ms. Bellissimo had interned for Westinghouse while a law student during the summers of 1976 and 1977. She had no problems with her supervisor there. After her acceptance by Westinghouse, she worked for six months in the International Law Section. Her supervisor there had no problems in his working relationship with Ms. Bellissimo and found her work to be adequate. In June, 1979, Ms. Bellissimo moved to Westinghouse's Ardmore Site as a contract specialist, the job that she had originally requested. Her supervisor there rated her work as good and had no serious problems in his working relationship with her. Ms. Bellissimo became dissatisfied with her position, however, and requested a transfer to the legal department. In November, 1979, she was transferred to the "learning and leisure" group of the legal

department after interviews with Mr. Marcovsky, who was to be her supervisor.

Ms. Bellissimo had heard that Mr. Marcovsky was difficult to work with. She therefore maintained contemporaneous notes of their conversations and conflicts from early in her employment in the legal department. The two had a running feud, Ms. Bellissimo became angry when Mr. Marcovsky suggested that she bring her luggage to the office on the day of a business trip rather than go home for it later. Mr. Marcovsky felt that her clothes were too tight-fitting too "flashy," and were not in keeping with the department's policy of dressing in a conservative style. Mr. Marcovsky asked Ms. Bellissimo's secretary if she and Ms. Belissimo were "getting along." He counseled Ms. Bellissimo that dancing in a bar with a client and leaving the bar with a client created a negative impression with

the other clients who were present, and told her to feign a headache and retire to her room if confronted with such a situation again. Mr. McGrath, a superior of Mr. Marcovsky, later overruled this advice to Ms. Bellissimo.

The difficulties between the two also emerged in disagreements over hours and punctuality at client meetings. Ms. Bellissimo wished to work 8:30 to 5:30, and her working hours remained an area of contention throughout her work in the law department. Mr. Marcovsky complained that she was slow in performing her work. The district court made no findings as to her work product. Westinghouse also alleges that she was late to client meetings, but Ms. Bellissimo contests the degree of her tardiness. The district court made no finding on this issue, and the evidence is conflicting.

The dismal working relationship between Ms. Bellissimo and Mr. Marcovsky reached its nadir on August 8, 1980, when Mr. Marcovsky spoke to her about being late for a client's meeting. Ms. Bellissimo screamed at Mr. Marcovsky, threatened to see a client about the perceived abuse she had received, walked out, and slammed the door. Ms. Bellissimo then took her complaints to the Executive Vice President of the Westinghouse division that Mr. Marcovsky served. He advised her to speak instead with Mr. Marcovsky. Westinghouse's general counsel testified that her action, which had immersed a Vice President in personnel matters within the law department, was important in his decision to discharge Ms. Bellissimo. Mr. Marcovsky told his superior, Mr. McGrath, that he was no longer able to supervise Ms. Bellissimo. On August 18, Mr. McGrath met

with Ms. Bellissimo and told her that she would either resign by August 22, 1980, with full salary through the end of September, 1980, or be terminated effective August 31, 1980. She chose to be discharged.

Ms. Bellissimo filed a timely comprehensive written charge of sex discrimination with the EEOC. The EEOC did not conclude an investigation within a year, and so, at Ms. Bellissimo's request, it issued a right to sue letter on September 24, 1981. She then sued. At the conclusion of an eight-day trial, the district court found in part:

> "11. Plaintiff established that the legitimate, nondiscriminatory reason asserted by defendants [for her discharge] is a mere pretext in that she established that the reason she could not get along with defendant Marcovsky was because he bore a discriminatory animus against her on the basis of her sex and that 'but for' this discrimination she would not have been discharged."

On appeal, Westinghouse contends that in all of the areas where Ms. Bellissimo complained of her treatment -- dress, working hours, luggage handling, and behavior with clients -- Ms. Bellissimo failed to offer any evidence that she was treated any differently from a male employee, and that without evidence of disparate treatment, Ms. Bellissimo could not sustain her burden of proof. Ms. Bellissimo counters that she had alleged the "obvious" basis of discrimination, the discharge, and that "Bellissimo offered ample proof of Marcovsky's pervasive, antagonistic supervision directed against her as a woman."

II. DISCUSSION

We begin our review by acknowledging that great deference must be paid to the district court's findings of fact in a

discrimination case. The Supreme Court has recently cautioned against the danger of what is essentially a de novo, appellate review of the record in a Title VII, sexual discrimination case:

> "The trial judge's major role is the determination of fact, and with experience in that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."

Anderson v. City of Bessemer, _____ U.S. _____, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518, 529 (1985). Justice Powell, however, recognized in his concurring opinion that courts of appeals may nevertheless sometimes have to undertake a "comprehensive review of the entire record." Id. at _____, 105 S.Ct. at 1515, 84 L.Ed.2d at 533. (Powell, J., concurring). We find that the present case is one in which such review is appropriate.

The crucial issue in this trial, a Title VII suit claiming sexual discrimination, was whether Marcovsky's actions were motivated by Ms. Bellissimo's gender. The district court's resolution of this issue was a finding of fact and may be reversed by this court only if the determination was "clearly erroneous" within the meaning of Fed. R.Civ.P. 52(a). Pullman-Standard v. Swint, 456 U.S. 273, 285-290, 102 S.Ct. 1781, 1784-88, 72 L.Ed.2d 66, 77-81 (1982).

The situation here is unusual. The facts are essentially undisputed. Both Marcovsky and Bellissimo were careful record keepers and both were able to provide detailed recountals. The record reveals exceptionally accurate and complete testimony from both sides. We also recognize, however, the parties' legal training may complicate the issues: an

attorney intent to discriminate would probably employ a subtle campaign to avoid detection of liability.

A. Burdens of Proof in a Title VII Case

As Judge Adams said in his dissent in University of Pittsburgh, there is "considerable confusion" regarding the proper standard of proof in Title VII cases. Lewis v. University of Pittsburgh, 725 F.2d 910, 921 (3d Cir. 1983). The Third Circuit has articulated a "but for" test whereby a plaintiff must show that his status as a minority class was the but for reason for the treatment accorded. Id. at 916. The Court has followed this test. Dillon v. Coles, 746 F.2d 998 (3d Cir. 1984); Duffy v. Wheeling Pittsburgh Steel, 738 F.2d 1393 (3d Cir. 1984).[1]

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1 The "but for" test test does not require a plaintiff to prove that the discriminatory reason was the determinative factor, but only that it

The procedure for reviewing a Title VII case is well-settled. The plaintiff has

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was a determinative factor. See Smithers v. Bailar, 629 F.2d 892, 898 (3d Cir. 1980) ("a plaintiff need not prove that [the discriminatory reason] was the employer's sole or exclusive consideration, but ... he must prove that [the discriminatory reason] made a difference in deciding the promotion, retention, or discharge"). Interpreting Title VII to require proof of "the determinative factor" is inconsistent with the "but for" causation test, insofar as plaintiff would be required to show that the discriminatory motive was the sole reason for the action taken. More than one "but for" cause can contribute to an employment decision, and if any one of those determinative factors is discriminatory, Title VII has been violated. See Lewis v. University of Pittsburgh, 725 F.2d at 917 n.8. On two occasions this Court has upheld jury instructions using the term "the determinative factor," but in both instances the Court concluded that in context the use of the definite article did not imply a "sole determinative factor" standard. See Lewis v. University of Pittsburgh, 725 F.2d at 916-18; Smithers v. Bailar, 629 F.2d at 896-98 ("appellate court reviews the charge as a whole, preserving context").

the burden first of showing by a preponderance of the evidence to make out a prima facie case of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), refining McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). A plaintiff alleging a discriminatory firing need show only that he was fired from a job for which he was qualified while others not in the protected class were treated more favorably. Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395 (3d Cir. 1984). The district court correctly found that Ms. Bellissimo "established a prima facie case."

After a plaintiff has established a prima facie case of discrimination, the burden is on the defendant to dispel the adverse inference by articulating some

legitimate, nondiscriminatory reason for the employee's rejection." Burdine, 450 U.S. at 2532, 101 S.Ct. at 1093, 67 L.Ed.2d at 215. The defendant's burden is not persuasion but only production of evidence supporting a reason for the discharge. If the defendant's evidence raises a genuine issue of fact, the presumption created by the plaintiff's prima facie showing drops from the case. Id. at 254-55, 101 S.Ct. at 1094-95, 67 L.Ed.2d at 215-16. The district court also found that the defendants had cleared this hurdle: "Defendants established a legitimate, nondiscriminatory reason for plaintiff's discharge ... in that the testimony and evidence showed that plaintiff was terminated due to her inability to get along with her supervisor, defendant [Marcovsky]." Conclusion of Law No. 10.

Once the defendant has satisfied this requirement of articulating a non-discriminatory reason for the discharge, the ultimate burden remains with plaintiff to prove the alleged reason was pretextual, that is, that the defendant intentionally discriminated against the plaintiff. Burdine, 450 U.S. at 256, 101 S.Ct. at 1095, 67 L.Ed.2d at 217. On appeal, Westinghouse challenges the sufficiency of Ms. Bellissimo's evidence used to discredit their legitimate, nondiscriminatory reason for her discharge. Westinghouse argues that any finding of discriminatory animus is clearly erroneous because there is no evidence -- let alone substantial evidence -- of more favorable treatment accorded male employees. Ms. Bellissimo counters that she has met her burden and proved disparate treatment by showing the "obvious basis of the discrimination": the discharge.

Proof of discharge will establish a prima facie showing in a Title VII suit. We have held that a plaintiff alleging a discriminatory layoff need show only that he was laid off from a job for which he was qualified while others not in the protected class were retained. Massarsky v. General Motors Corporation, 706 F.2d 111, 118 (3d Cir. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983). This prima facie case "is easily made out." Id. Bellissimo has met this burden. She established that she was within a protected class, women, and that Westinghouse fired her from her job within the Legal Department even though she was qualified to work as an attorney there. She has also shown that men who worked within the Legal Department were not fired.

Bellissimo has, however, failed to rebut Westinghouse's nondiscriminatory

reason for her discharge. A discharge is not per se disparate treatment. It violates Title VII's commands only if it is made on a basis that would not result in the discharge of a male employee. See Moore v. City of Charlotte, 754 F.2d 1100, 1106, 1110 (4th Cir. 1985). Westinghouse argued that it discharged Bellissimo because of her inability to cooperate with her supervisor. The district court found that Bellissimo proved that this was pretext. We find that this conclusion is clearly erroneous because Ms. Bellissimo failed to make any showing of disparate treatment and because Westinghouse proved that male attorneys were treated the same as she in the disputed areas.

Both Dillon and Duffy necessarily imply that a plaintiff making allegations similar to Ms. Bellissimo's is required to show disparate treatment. In Duffy for

example, both the majority opinion and Judge Adams's dissent noted that the district court made comparisons between the discharged employee and the younger salesmen who were kept on the force, although they disagreed over the accuracy of the district court's interpretation of the data. 738 F.2d at 1396-97; id. at 1401-03 (Adams, J., dissenting). In Dillon, the Court noted that the district court had made explicit findings of fact that the rejected female plaintiff was similarly or better situated than three male competitors who were offered the job. 746 F.2d at 1001-02. These views of the district court's findings are consistent with the Court's earlier guidance in Kunda v. Muhlenberg College, 621 F.2d 532, 538 (3d Cir. 1980):

> The [Civil Rights Act of 1964] prohibits only "discrimination." Therefore, consideration of the practices of the college toward the

> plaintiff must be evaluated in light of its practices toward the allegedly more favored group, in this case males."

B. Review of the Evidence

It appears that the conflict between Ms. Bellissimo and Mr. Marcovsky began in earnest when he suggested to her that, when leaving for a business trip at 7:00 p.m. from the Pittsburgh airport, it would be better to bring her luggage with her to the office in the morning rather than for her to go home and pick it up. This is certainly an observation that is not necessarily provocative or offensive. The Westinghouse office is midway between the airport and Ms. Bellissimo's home. She conceded that Mr. Marcovsky brought his luggage to the office prior to a trip.

The next incident, to which the district court attached significance, concerned Ms. Bellissimo's behavior in a

cocktail lounge after a meeting with clients. There she danced with a Westinghouse executive and then left the bar with him. Mr. Marcovsky, hearing of the incident through the complaint of a client present at the cocktail lounge, advised her that on business trips she should relate to Westinghouse executives solely as lawyer to client. Ms. Bellissimo characterized the incident as "blatant discrimination"; she felt she "could not do something because [she] was a woman."

We find this advice to be within the realm of Mr. Marcovsky's concerns as a supervisor. Mr. Marcovsky testified that he spoke to Ms. Bellissimo only because of the complaint. Our review of the testimony on this incident convinces us that the advice was made with civility and with deference. He emphasized that her behavior was not wrong, but simply that it "created a negative impression with the clients."

In that same discussion, Mr. Marcovsky suggested to Ms. Bellissimo that she, in her own words, "tone down" her attire. Clothing was never mentioned again during Ms. Bellissimo's employment. The district court concluded that this remark was part of Mr. Marcovsky's animus towards Ms. Bellissimo. Dress codes, however, are permissible under Title VII as long as they, like other work rules, are enforced even-handedly between men and women, even though the specific requirements may differ. As the D.C. Circuit has noted, an employer is permitted to exercise its legitimate concern for the business image created by the appearance of its employees:

> Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an

> employer's proper desire to achieve favorable acceptance.

Fagan v. National Cash Register Co., 481 F.2d. 1115, 1124-25 (D.C. Cir. 1973).

Westinghouse's evidence shows that although it had no written code, it consistently sought to maintain a conservative dress style in its legal department, and that men were also counselled on their attire. Male attorneys were urged not to wear sport jackets or slacks to the office, and to keep their jackets on during meetings. We therefore find that Mr. Marcovsky's counselling Ms. Bellissimo regarding her attire was not disparate treatment and will not support a Title VII claim.

The district court observed in three findings of fact that Mr. Marcovsky had questioned Ms. Bellissimo's working hours. The court, however, failed to make

any finding whether her working hours were in fact unsatisfactory. The court also failed to make any finding concerning whether male attorneys worked longer or shorter hours, or whether they were counselled about their hours. What evidence there is undermines Ms. Bellissimo's allegation of sexual discrimination. Testimony from both Ms. Bellissimo and Mr. Marcovsky shows that Ms. Bellissimo stated her wish to work only 40 hours a week and her belief that she should receive greater salary if she were to work longer hours. There was, however, evidence that attorneys and other management professionals frequently worked more than forty hours without additional compensation. We find that, without more of a showing from Ms. Bellissimo, that this counselling regarding work hours was appropriate and is not a showing of animus or sexual discrimination.

The district court also observed that Mr. Marcovsky asked his secretary, who was also Ms. Bellissimo's secretary, if she and Ms. Bellissimo were getting along. She reported that they were getting along very well. Ms. Bellissimo found the exchange offensive because "[Marcovsky] could have asked me if we were getting along." The district court has given no indication of the reason it considered this exchange inappropriate or evidence of animus. We find nothing in the query offensive or abusive, or indicative of an abusive attitude. We therefore find that this exchange proves nothing substantial in Ms. Bellissimo's Title VII claim.

Finally, the district court found that Ms. Bellissimo requested a performance review, but that Mr. Marcovsky did not offer such a review. The undisputed trial testimony shows that Mr. Marcovsky told

Ms. Bellissimo that Westinghouse's practice was to conduct evaluations only annually, although he continuously reviewed and evaluated her work. There was no evidence that Westinghouse selectively enforced its policy on only annual reviews. Ms. Bellissimo had failed to establish any significance to Mr. Marcovsky's -- and Westinghouse's -- review procedure.

In short, the district court found that counselling an employee, here an attorney in a corporate law department, concerning her public behavior with a client on a business trip, her working hours, and -- on one occasion only -- her attire, constituted discriminatory treatment. The district court made this holding without finding, and without evidence, that men in the law department had been treated any differently, and in spite of evidence that two male attorneys had been reprimanded for

cavorting in a public park, that male attorneys worked more than 40 hours per week, and that male attorneys had been advised to conform to a conservative dress style.

III.

The judgment in a case such as this rests on whether the plaintiff carries "the ultimate burden of persuading the court that she has been the victim of intentional discrimination." Burdine, 450 U.S. at 256, 101 S.Ct. 1095, 67 L.Ed.2d at 217. With deference to the clearly erroneous standard, we are convinced that Ms. Bellissimo failed to establish the pretextual nature of Westinghouse's reason for discharge. In all of the aspects of employment the district court examined -- dress, working hours, behavior with clients, evaluations, and luggage handling

-- there was no evidence to support her contention -- that she was treated any differently from male employees. On the contrary, evidence in the record shows that she was treated the same as male attorneys. Mr. Marcovsky emerges as a strict supervisor who counselled Ms. Bellissimo to adapt to a department with exacting standards in many areas typically left to the individual's discretion. Ms. Bellissimo emerges as an adequate but strident, touchy, and difficult employee. This unfortunate and destructive conflict of personalities does not establish sexual discrimination. The judgment of the district court finding Westinghouse and Marcovsky guilty of sexual discrimination accordingly will be reversed.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3375

ELIZABETH L. BELLISSIMO,

v.

WESTINGHOUSE ELECTRIC
CORPORATION, et al.,

Appellants.

(C.A. No. 81-1650)

SUR PETITION FOR PANEL REHEARING
AND REHEARING IN BANC

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN and WISDOM* Circuit Judges

The petition for rehearing before the original panel or rehearing in banc filed by appellee in the above-entitled case having been submitted to the judges who particpated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for panel rehearing or rehearing in banc is denied.

BY THE COURT,

/s/ Arlan M. Adams
Circuit Judge

DATED: July 10, 1985

*As to panel rehearing only.